



DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 251

RIN 0596-AD44

Land Uses; Special Uses; Annual Programmatic Administrative Fee for Communications Use Authorizations

AGENCY: Forest Service, Agriculture (USDA).

ACTION: Proposed rule.

SUMMARY: The Forest Service (Agency), U.S. Department of Agriculture, is proposing to amend its existing regulations to charge a statutorily required annual programmatic administrative fee for new and existing communications use authorizations to cover the costs of administering the Agency's communications use program. Existing communications use authorizations would be amended to provide for payment of the required annual programmatic administrative fee.

DATES: Comments must be received in writing by **[insert date 60 days from date of publication in the *FEDERAL REGISTER*]**.

ADDRESSES: Comments, identified by RIN 0596-AD44, may be submitted via one of the following methods:

1. Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for sending comments.
2. Mail: Director, Lands & Realty Management Staff, 201 14th Street, SW, Washington, DC 20250-1124.
3. Hand Delivery: Director, Lands & Realty Management Staff, 1st Floor South East, 201 14th Street, SW, Washington, DC 20250-1124.

All timely comments, including names and addresses when provided, will be placed in the record

and will be available for public inspection and copying. The public may review comments at Office of the Director, Lands & Realty Management, 1st Floor Southeast, Sidney R. Yates Federal Building, 201 14th Street, SW, Washington, DC, during normal business hours. Visitors are encouraged to call ahead at 202-205-3563 to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Joey Perry, Lands & Realty Management Staff, 530-251-3286, joey.perry@usda.gov. Individuals who use telecommunication devices for the deaf/hard-of-hearing (TDD) may call the Federal Relay Service (FRS) at 1-800-877-8339 between 8:00 a.m. and 5:00 p.m., 24 hours per day, every day of the week, including holidays.

SUPPLEMENTARY INFORMATION:

Background

The Agency is responsible for managing Federal lands that are adjacent to rural and urban areas. These rural and urban communities depend on Federal lands for critical communications services, including emergency services, internet service, cellular communications, and television and radio broadcasting services. The Agency authorizes the use and occupancy of National Forest System (NFS) lands for communications facilities (buildings, towers, and ancillary improvements and fiber optic cable) that provide these critical communications services. The Agency administers over 3,700 special use authorizations for infrastructure that supports over 10,000 wireless communications uses at 1,367 communications sites and administers over 400 special use authorizations for fiber optic cable communications uses on NFS lands.

The U.S. Department of Agriculture’s Rural Prosperity Task Force Report of 2017 identified connecting rural communities across the United States as a strategic priority for USDA because “[i]n today’s information-driven global economy, e-connectivity is not simply an amenity—it has become essential.”

Executive Order 13821, *Streamlining and Expediting Requests to Locate Broadband Facilities in Rural America*, issued January 8, 2018, states that “Americans need access to

reliable, affordable broadband internet service to succeed in today's information-driven, global economy" (83 FR 1507). Executive Order 13821 directs Federal agencies "to use all viable tools to accelerate the deployment and adoption of affordable, reliable, modern high-speed broadband connectivity to rural America. . . ." *Id.* Agencies are encouraged to reduce barriers to capital investments, remove obstacles to broadband services, and more efficiently employ Government resources. *Id.*

On June 12, 2020, a Secretarial Memorandum was issued to the Chief of the Forest Service, which directs the Agency to focus resources on activities that support the productive use of NFS lands to deliver goods and services efficiently and effectively to meet the needs of the public. The Agency was specifically directed to expedite broadband development on NFS lands to increase connectivity in rural America.

Need for the Proposed Rule

Regardless of where they live, consumers require reliable communications services. The need for wireless connectivity for teleworking, tele-education, telehealth, and telemedicine is even more vital considering events like the COVID-19 pandemic. To meet the demand for these critical services, the Agency must be prepared to do its part by ensuring it has the necessary staff and expertise to administer its communications use program.

In addition to being statutorily mandated as outlined below, the annual programmatic administrative fee would provide the funds necessary to support a more modernized, efficient, and enhanced communications use program. Programmatic administrative fee revenues would be used to reduce the backlog of expired communications use authorizations; streamline implementation by fully staffing the program; enhance automated applications; improve internal and external outreach, including training for employees; fund the national billing team; conduct national oversight; and obtain or improve access to communications sites.

The Agriculture Improvement Act of 2018 (the 2018 Farm Bill) was signed into law on December 20, 2018. Title VIII, Subtitle G, section 8705, of the 2018 Farm Bill, as amended by

Division D, Title IV, section 416, of the Further Consolidated Appropriations Act, 2020 (Pub. L. No. 116-94), codified as 43 U.S.C. 1761a, requires the Agency to charge an annual programmatic administrative fee for communications use authorizations to cover the costs of the Agency's communications use program. Specifically, section 8705(c)(3)(B) directs the Agency to issue regulations that require a structure of fees for issuing communications use authorizations based on the cost to the Agency for any maintenance or other activities required to be performed by the Agency as a result of the location or modification of a communications facility. Section 8705 of the 2018 Farm Bill, as amended, also authorizes the Agency to retain and spend annual programmatic administrative fee revenues to cover the costs of the Agency's communications use program. The proposed rule would implement the statutory requirement to charge an annual programmatic administrative fee for communications use authorizations to cover the costs of administering the Agency's communications use program.

Current Forest Service regulations at 36 CFR part 251, subpart B, govern the processing of special use applications and issuance of special use authorizations for uses of NFS lands, including communications uses. Forest Service Handbook (FSH) 2709.11, Chapter 90, provides direction for communications use management, including processing of communications use applications and administration of communications use authorizations. The following is a description of the proposed regulatory and directive revisions needed to comply with section 8705 of the 2018 Farm Bill.

Proposed Revisions to Existing Regulations

Section 251.54(g)(5) of the Agency's current regulations sets forth the Agency's procedures for authorization of a special use. The Agency proposes to implement section 8705(c)(3)(B) of the 2018 Farm Bill by adding a new subparagraph to §251.54(g)(5), which governs the issuance of special use authorizations. Consistent with section 8705(c)(3)(B), new paragraph (g)(5)(iii) would require that an annual programmatic administrative fee be charged

for communications use authorizations to cover the costs of administering the Agency's communications use program.

Section 8705(f)(4) of the 2018 Farm Bill provides that programmatic administrative fee revenues are to be used to cover any costs incurred by the Agency in administering its communications use program, including but not limited to the costs of on-site reviews of communications sites, developing communications site management plans, hiring and training personnel for the communications use program, conducting internal and external outreach for and national oversight of the communications use program, and obtaining or improving access to communications sites on NFS lands. This annual programmatic administrative fee would be in addition to land use fees assessed based on the fair market value of the rights and privileges granted by each communications use authorization, as provided for in existing regulations at 36 CFR 251.57. The Agency does not have authority to retain and spend the land use fees it collects for communications uses, which must be deposited into the United States Treasury. In addition, the Agency charges fees to recover the Agency's costs for processing communications use applications and monitoring compliance with communications use authorizations, as provided for in existing regulations at 36 CFR 251.58. Cost recovery fees are charged to specific applicants for and holders of a communications use authorization to cover costs associated with processing their application and monitoring compliance with their communications use authorization. Neither of these existing fees covers the programmatic costs of administering the communications use program.

To meet the requirements of section 8705 of the 2018 Farm Bill, the Agency proposes to charge an annual programmatic administrative fee of \$1,400 per communications use authorization for wireless uses such as television and radio broadcasting, cellular telephone, and microwave and \$400 per communications use authorization for fiber optic cable. The annual programmatic administrative fee for authorizations for fiber optic cable would be lower because authorizations for this type of use have lower programmatic administrative costs, as explained

below. These two programmatic administrative fees reflect the Agency's total estimated annual costs of administering its communications use program, allocated as deemed applicable by the Agency between communications use authorizations for wireless uses and communications use authorizations for fiber optic cable, and prorated to split the cost evenly among the authorizations of each type. This allocation and proration would provide for programmatic administrative fees for communications use authorizations that are equitable to the extent possible within the constraints of the 2018 Farm Bill, which requires the Forest Service to recover the programmatic administrative costs for its communications use program. The Agency will include in the rulemaking record documentation of the estimated costs upon which the \$1,400 and \$400 annual programmatic administrative fees are based. The two annual programmatic administrative fees would be updated annually based on the difference in the U.S. Department of Labor Consumer Price Index for All Urban Consumers, U.S. City Average (CPI-U), from July of one year to July of the following year, rounded up or down to the nearest dollar. The Agency would review the two annual programmatic administrative fees no later than 5 years after the effective date of the final rule and at least every 5 years thereafter and would revise the fees as needed to ensure they continue to reflect the Agency's total estimated annual costs of administering its communications use program.

In the last decade there has been a significant increase in the volume, complexity, and types of communications uses in the United States, including on NFS lands. Additional Agency personnel, improved efficiencies, and current technology are critical for meeting this increased demand for communications uses on NFS lands, as well as the Administration's goal of enhancing access to high-speed broadband on Federal lands. Per direction in the 2018 Farm Bill, the Agency would use the annual programmatic administrative fee revenues to cover the costs of administering its communications use program, including but not limited to the costs of on-site reviews of communications sites, preparation of communications site management plans, and program oversight and management. This includes reducing the backlog of expired

communications use authorizations, streamlining program implementation, enhancing automated applications, hiring and training personnel for the communications use program, conducting internal and external outreach and enhanced training for employees, and obtaining or improving access to communications sites on NFS lands.

Estimated costs for administering the Agency's communications use program are \$5.4 million per year, equivalent to the total programmatic administrative fee revenues that would be collected using the proposed fee structure from existing communications use authorization holders as of 2019. The revenues would cover the personnel and other resource costs needed to administer a more modernized, efficient, and enhanced communications use program, thereby enhancing deployment of wireless and wired communications services.

Table 1: Estimated Cost Breakdown

| Task | Wireless (3,715) | Fiber (444) | Totals | Rates | Remarks |
|---|-----------------------|------------------------|-----------------------|----------|--------------------------------------|
| On-site Reviews | \$2,799,215.35 | \$0.00 | \$2,799,215.35 | \$753.49 | 3,715 (wireless) |
| Communications Site Management Plans | \$435,984.69 | \$0.00 | \$435,984.69 | \$117.36 | 3,715 (wireless) |
| Program Oversight and Management: | | | | | |
| •Salary, benefits, and overhead costs | \$1,542,616.60 | \$184,366.56 | \$1,726,983.16 | \$415.24 | 4,159 (wireless & fiber optic cable) |
| •Staff training | \$108,960.95 | \$13,022.52 | \$121,983.47 | \$29.33 | 4,159 (wireless & fiber optic cable) |
| •Access | \$300,000.00 | \$0.00 | \$300,000.00 | \$80.75 | 3,715 (wireless) |
| TOTAL | \$5,186,777.59 | \$197,389.08 | \$5,384,166.67 | | |
| Total Share for Wireless Authorizations (\$5,186,777.59/3715) | \$1,396.17 | \$1,400 rounded | | | |
| Total Share for Fiber Optic Cable Authorizations (\$197,389.08/444) | \$444.57 | \$400 rounded | | | |

To determine the two annual programmatic administrative fees, the Agency first estimated the total annual programmatic administrative costs for its communications use program, including the costs of on-site reviews of authorized communications sites, preparation of communications site management plans, hiring and training personnel for the communications use program, land use fee billing and collection, and obtaining or improving access to communications sites. Those costs were then allocated between communications use authorizations for wireless uses and communications use authorizations for fiber optic cable. The total costs for each authorization type was then prorated to divide the total equally among all communications use authorizations of each type: 3,715 wireless authorizations and 444 fiber optic authorizations. As shown in Table 1 above and explained in further detail below, fiber optic cable authorizations are not allocated the costs of on-site reviews of communications sites,

preparation of communications site management plans, or obtaining or improving access to communications sites because those costs are not incurred in connection with those authorizations. All other annual programmatic administrative costs were allocated to communications use authorizations for wireless uses and fiber optic cable.

On-Site Reviews

Annual costs of on-site reviews of communications sites were allocated only to communications use authorizations for wireless uses. This is because wireless use authorizations involve installation, operation, and maintenance of above-ground communications facilities such as towers, which require annual on-site reviews. However, fiber optic cable authorizations typically do not require on-site reviews because fiber optic cable is buried or co-located on other infrastructure, such as a utility line.

The total annual estimated cost of on-site reviews of communications sites on NFS lands is approximately \$2,800,000. The estimate of \$2,800,000 is based on the cost to conduct an annual on-site review of each of the 1,367 communications sites on NFS lands, including:

- Reviewing any pertinent information related to communications sites and authorized uses;
- Notifying and coordinating with communications use authorization holders regarding on-site reviews;
- Traveling to and from communications sites;
- Conducting on-site reviews, including gathering data for development and implementation of the communications site management plans governing all communications uses at each site and ensuring that technical and administrative requirements for management of each site are being met to provide for compatibility of communications uses;
- Documenting and approving maintenance activities;
- Preparing a report and any follow-up correspondence; and

- Entering data into the Special Uses Data System and conducting any needed follow-up.

On average, this work is conducted by a General Schedule (GS)-11, step 1, employee at a daily rate of \$326. The daily rate was based on the yearly salary in 2019 for a GS-11, step 1, employee of \$62,236, plus estimated employee benefits (e.g., health insurance and retirement benefits) of \$22,764, or \$85,000 per year. The daily rate was calculated by dividing the yearly salary and benefits of \$85,000 by 2,087 hours per year (the divisor used by the Office of Personnel Management to compute federal employees' cost-to-government hourly rate) and multiplying the quotient of \$40.73 per hour by 8 hours, a typical workday, which equals \$325.84, or \$326 rounded to the nearest dollar. On-site reviews of authorized communications uses take approximately 2.125 days to complete, or \$692.75 for employee salary, plus \$60.74 for vehicle expenses (2 days of vehicle use at \$11.87 per day and an estimated 100 miles driven at \$0.37 per mile), for a total estimated cost of \$753.49 annually per authorization. The total annual estimated cost of \$2,800,000 for on-site reviews of communications sites was determined by multiplying the annual estimated cost of \$753.49 per authorization by 3,715, the total number of communications use authorizations for wireless uses, rounded.

Communications Site Management Plans

Similar to the cost of on-site reviews, annual costs of development, approval, and maintenance of communications site management plans were also allocated only to communications use authorizations for wireless uses. Wireless use authorizations are subject to a communications site management plan to facilitate orderly development of communications sites, ensure authorized uses are compatible, and provide for a safe and high-quality communications environment. Fiber optic cable authorizations do not need a communications site management plan because fiber optic cable is buried or co-located on other infrastructure and cannot cause interference concerns.

For development, approval, and maintenance of communications site management plans, the Agency estimated a total annual programmatic administrative cost of \$436,000. This estimate was based on the cost of completing or updating 137 communications site management plans per year, given that there are 1,367 communications sites on NFS lands and standard Agency practice requires communications site management plans to be updated every 10 years to keep pace with changes in technology and industry protocols. The preparation work, coordination of the site visit, and approval of the communications site management plan takes approximately 2 days for a local employee to complete, at an estimated cost of \$652 for employee salary and benefits (a GS-11, step 1, employee at a daily rate of \$326, see calculations above), travel costs of \$2,500 (using standard per diem rates and typical travel costs) for a national or regional communications site specialist to visit the site and complete the work, and \$30.37 for vehicle expenses (1 day of vehicle use at \$11.87 per day and an estimated 50 miles driven at \$0.37 per mile). The salary costs for the national or regional communications site specialist that visits the site were included under the program oversight and management costs described below, so they are not included in the estimate of total costs for communications site management plans. The total annual estimated cost of \$436,000 for development, approval, and maintenance of communications site management plans was determined by multiplying the annual estimated cost of \$3,182.37 per site by 137, the total number of communications site management plans that would be completed or updated each year, rounded.

Program Oversight and Management

The Agency estimated a total annual programmatic administrative cost of approximately \$2,149,000 for program oversight and management of the Agency's communications use program, including a trained and dedicated staff of 14 employees; overhead for travel, staff training, office space, supplies, and information technology development and support; biannual employee training; and the cost of obtaining or improving access to communications sites on

NFS lands. Specifically, the total estimated annual cost of program oversight and management was based on the following:

- Salary, benefits, and overhead costs: Costs for general program administration, salary, and overhead costs of approximately \$1,727,000 for the 14 employees needed to manage the program, ranging from a GS-9 to a GS-14 employee.
- Staff training: Costs of approximately \$122,000 for 2 yearly employee trainings for communications use management. Each 1-week training session includes the cost of training materials, the venue, and incidental costs for 23 employees (20 students, who are employees who administer the communications use program at the field level, and 3 instructors).
- Access: Costs of approximately \$300,000 for obtaining or improving access to communications sites (fiber optic cable authorizations are exempt from this cost because they do not require additional access).

Of the above listed costs, the total estimated allocations for the 3,715 communications use authorizations for wireless uses are as follows: \$2,799,215 for annual on-site reviews of communications sites, \$435,985 for development, approval, and maintenance of communications site management plans, \$1,542,617 for general program administration (prorated to 3,715 of the total 4,159 authorizations this cost applies to), \$108,961 for training (prorated to 3,715 of the total 4,159 authorizations this cost applies to), and \$300,000 for obtaining or improving access to communications sites. This results in a wireless use authorization cost total of approximately \$5,186,777. Divided by 3,715 authorizations for wireless uses, the annual programmatic administrative fee for wireless use authorization is set at \$1,400 (\$1,396.17 rounded to the nearest hundred dollars).

For the 444 communications use authorizations for fiber optic cable, the total estimated annual programmatic administrative costs include \$184,367 for general program administration (prorated to 444 of the total 4,159 authorizations), and \$13,023 for training (prorated to 444 of

the total 4,159 authorizations), resulting in a total of \$197,390. The annual programmatic administrative fee for those authorizations is calculated by dividing \$197,390 by 444 authorizations for fiber optic cable, which equals \$444.57, or \$400 rounded to the nearest hundred dollars.

Section 8705(f) of the 2018 Farm Bill authorizes the Agency to retain and spend the annual programmatic administrative fee revenues that would be collected under the proposed rule to cover the costs of administering the Agency's communications use program. The total fees proposed here would collect \$5,186,777 for wireless use authorizations and \$197,390 for fiber optic cable use authorizations, a total of \$5,384,167 to be collected and retained by the Forest Service for administering the communications use program.

Proposed Revisions to Agency Directives

FSH 2709.11, Chapter 90

The Agency is proposing to revise its directives in FSH 2709.11, Chapter 90, concurrently with this rulemaking. Consistent with section 8705(c)(3) of the 2018 Farm Bill and the proposed revisions to the Agency's regulations, the proposed directive would amend Chapter 90 to implement an annual \$1,400 programmatic administrative fee for communications use authorizations for wireless uses and an annual \$400 programmatic administrative fee for communications use authorizations for fiber optic cable and provide for updating the two annual programmatic administrative fees every 5 years. The proposed directive would also amend Chapter 90 to establish direction on expenditure of annual programmatic administrative fee revenues.

Upon adoption of a final rule, a separate notice will be published in the *Federal Register* announcing the availability of the proposed directive, including information on how to comment on the directive and a link to the proposed directive, which will be posted on the Agency's website.

Regulatory Certifications

For rules designated as significant by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget, Executive Order (EO) 12866, as supplemented by EO 13563, directs agencies to conduct a regulatory impact analysis, including an assessment of costs and benefits of available regulatory alternatives and regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and distributive impacts). EO 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The regulatory impact analysis must assess both the costs and benefits of the regulation, recognizing quantifiable analysis is not always possible, but that a reasoned determination be made that the benefits justify the regulatory costs.

The Agency conducted a regulatory impact analysis for the proposed amendments to 36 CFR part 251, subpart B, and FSH 2709.11, Chapter 90, to charge an annual programmatic administrative fee for new and existing communications use authorizations to cover the costs of administering a more modernized, efficient, and enhanced Agency communications use program. The regulatory impact analysis compares the costs to administer the communications use program under the existing regulations with the costs to administer the more modernized, efficient, and enhanced communications use program under the proposed rule. Administrative costs of the program under the existing regulations are covered by federal budget allocations; under the proposed rule, administrative costs of the program would be covered by revenues from the annual programmatic administrative fee for communications use authorizations (i.e., payment for the annual cost of administering the program would be transferred from the Federal government to communications use authorization holders). Benefits, including programmatic modernization, efficiencies, and enhancements, are addressed qualitatively.

As of 2019, a total of 4,159 (wireless and fiber optic cable) communications use authorizations were held by 1,448 unique entities, including 765 businesses, 384 governments or

agencies, 266 organizations, and 33 individuals or households. Of the 4,159 communications use authorizations, 3,715 were for wireless communication uses, and 444 were for fiber optic cable. Based on an annual programmatic administrative fee of \$1,400 per communications use authorization for wireless uses and \$400 per communications use authorization for fiber optic cable, the Agency would collect a total of approximately \$5.4 million annually from communications use authorization holders. The revenue generated from the annual programmatic administrative fee would cover the annual costs of administering the Agency's communications use program. Based on the costs of a more modernized, efficient, and enhanced program, annual programmatic administrative costs under the proposed rule are estimated to be \$1.8 million greater than annual programmatic administrative costs under the current regulations. Assuming annual incremental costs of \$1.8 million are constant over a period of 15 years, the present value of these costs is estimated at \$18 million using a 7% discount rate and \$22 million using a 3% discount rate. Providing present value costs using these assumptions is consistent with Office of Management and Budget Circular A-4 implementing EO 12866 when there is uncertainty about discount periods.

The annual programmatic administrative fee would provide the funds necessary to support a more modernized, efficient, and enhanced communications use program.

Programmatic administrative fee revenues would be used to reduce the backlog of expired communications use authorizations; streamline implementation by fully staffing the program; enhance automated applications; improve internal and external outreach, including training for employees; fund the national billing team; conduct national oversight; and obtain or improve access to communications sites. The benefits from a more modernized, efficient, and enhanced communications use program funded by the annual programmatic administrative fee for communications use authorizations are expected to exceed the incremental annual programmatic administrative costs of \$1.8 million per year.

The benefits that would be achieved under the proposed rule are consistent with the objectives EO 13821, *Streamlining and Expediting Requests to Locate Broadband Facilities in Rural America* (2018), which encourages Federal agencies to reduce barriers to capital investments, remove obstacles to broadband services, and more efficiently employ Federal resources. The benefits from implementation of the proposed rule would also be consistent with the goals of the 2020 Secretarial Memorandum to the Chief of the Forest Service, which directs the Agency to expedite broadband development on NFS lands to increase connectivity in rural America. The proposed rule is also required by section 8705 of the 2018 Farm Bill, which directs the Agency to charge an annual programmatic administrative fee for communications use authorizations to cover the Agency's costs to administer its communications use program. Section 8705 of the 2018 Farm Bill, as amended, authorizes the Agency to retain and spend programmatic administrative fee revenues.

Costs associated with potential loss of other resources or environmental goods and services foregone by the presence of communications uses on NFS lands (opportunity costs) are assumed to be no different and could be lower under the proposed rule compared to baseline administrative conditions. Requirements to identify and mitigate environmental impacts from communications uses through National Environmental Policy Act compliance and Agency land management planning would remain unchanged under the proposed rule. More modernized, efficient, and enhanced program administration supported by the annual programmatic administrative fee charged under the proposed rule would provide greater opportunities to ensure environmental and resource protection.

Average annual programmatic administrative fees incurred by communications use authorization holders are projected to range from \$3,400 to \$4,800 per entity, given that a single entity often has more than one authorization. There is potential for existing or future customers to alter their decisions about obtaining a communications use authorization in response to the cost of the annual programmatic administrative fee or anticipated benefits (e.g., time-valued

revenue gains). However, the effect of these disincentives and incentives on decision making is likely to be small or hard to measure in comparison to the magnitude of other operating costs or expenditures, annual revenues, or other market factors affecting management and investment decisions. In many cases, a decision to pursue a communications use authorization is also driven by the comparative operating advantages of locating communications uses or facilities on NFS lands versus locating them on non-NFS lands. The proposed rule is therefore not expected to trigger significant changes in the number of communications use authorizations or the output of communications services under those authorizations. Economic or distributional impacts (i.e., changes in jobs and labor income) of communications use authorizations are likewise not expected to be significant.

Congressional Review Act

Pursuant to Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (known as the Congressional Review Act) (5 U.S.C. 801 *et seq.*), OIRA has designated this proposed rule as not a major rule as defined by 5 U.S.C. 804(2).

National Environmental Policy Act

The proposed rule would establish procedures for charging an annual programmatic administrative fee for communications use authorizations to cover the costs of administering the Agency's communications use program. Agency regulations at 36 CFR 220.6(d)(2) (73 FR 43093) exclude from documentation in an environmental assessment (EA) or environmental impact statement (EIS) "rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instructions." The Agency has concluded that the proposed rule falls within this category of actions and that no extraordinary circumstances exist which would require preparation of an EA or EIS.

Regulatory Flexibility Act Analysis

Consistent with the Regulatory Flexibility Act (RFA), 5 U.S.C. 602 *et seq.*, as amended by the Small Business Regulatory Flexibility Enforcement Fairness Act of 1996, and EO 13272,

the Agency conducted a threshold regulatory flexibility analysis to determine whether the proposed rule would have a significant economic impact on a substantial number of small entities. If the threshold regulatory flexibility analysis supports a determination that the proposed rule would not have a significant economic impact on a substantial number of small entities, a regulatory flexibility analysis is not needed.

Pursuant to the threshold regulatory flexibility analysis, the Agency has determined that the proposed rule would impact 1,448 unique entities that hold a communications use authorization. Of those 1,448 unique entities, 1,080 qualify as small entities, including 645 small businesses, 187 small governmental entities, and 248 small organizations.

The threshold RFA analysis results suggest that the economic impact from the proposed rule would be less than 1% of annual salaries and wages for most (180 of 187) small governments that currently hold a communications use authorization. Of the seven small governments with an estimated economic impact greater than 1%, only 3 small governments are projected to experience an economic impact of approximately 9% to 14% of annual salaries and wages, but they account for less than 1% of the estimated population of small local governmental units (cities and towns) within the economic impact areas of National Forests.

The threshold RFA analysis results show that the economic impact from the proposed rule would be less than 0.5% of annual expenses for 74 or 30% of the 248 small organizations known to have communications use authorizations. The economic impact would range from approximately 1% to 2% of annual expenses for 138 or 56% of small organizations and approximately 2% to 5% of annual expenses for 33 or 13% of small organizations. The remaining 3 or 1% of small organizations are projected to experience an economic impact of approximately 5% to 11% of annual expenses from the proposed rule. There may be unknown small organizations that would be subject to the proposed rule, but the relatively low number of known small organizations projected to experience an economic impact of approximately 2% to 5% of annual expenses and the few organizations (estimated at 3) projected to experience an

economic impact of approximately 5% to 11% of annual expenses suggest that the proposed rule would not have a significant economic impact on a substantial number of small organizations.

The threshold RFA analysis results suggest that the average annual programmatic administrative fees under the proposed rule (i.e., its economic impact) would be 1% or less of annual receipts for 536 (83%) of the 645 small businesses that have existing communications use authorizations. The 536 include all small businesses with annual receipts of \$100,000 to \$500,000 (except for 7 small businesses in the Wireless Telecommunications industry), as well as small businesses with annual receipts greater than \$500,000.

Economic impacts are estimated to be 4% to 5% of annual receipts for the remaining 109 small businesses distributed across 65 industries and earning annual receipts of less than \$100,000 (representing the smallest receipt category). For most industries, only 1 to 5 small businesses per industry are projected to experience economic impacts of 4% to 5% of annual receipts. The 1 to 5 small businesses account for 8% to 17% of small businesses with communications use authorizations within each industry and less than 0.1% to 8% of the U.S. population of small businesses with annual receipts of less than \$100,000 within each industry. For two industries, Telecommunications Resellers (NAICS 517911) and Other Telecommunications (NAICS 517919), 20 and 19 small businesses, respectively, are estimated to experience impacts of 5%, accounting for 13% and 24%, respectively, of small businesses with communications use authorizations in these two industries and 4% and 8% of the U.S. small business population with annual receipts of less than \$100,000 in these two industries.

The programmatic efficiencies from a more modernized, efficient, and enhanced communications use program funded by the annual programmatic administrative fee would benefit small entity communications use authorization holders.

For the foregoing reasons, the proposed rule would not have a significant economic impact on a substantial number of small entities, and small entities are expected to benefit

indirectly from programmatic changes made possible by the programmatic administrative fees under the proposed rule. Therefore, an RFA analysis is not required for the proposed rule.

Federalism

The Agency has considered the proposed rule under the requirements of EO 13132, *Federalism*. The Agency has determined that the proposed rule conforms with the federalism principles set out in this EO; would not impose any compliance costs on the states; and would not have substantial direct effects on the states, on the relationship between the Federal government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, the Agency has concluded that the proposed rule does not have federalism implications.

Consultation and Coordination with Indian Tribal Governments

The Agency has reviewed this proposed rule in accordance with the requirements of EO 13175, *Consultation and Coordination with Indian Tribal Governments*. The Agency has determined that national tribal consultation is not necessary for the proposed rule. The proposed rule, which would implement the statutory requirement to charge an annual programmatic administrative fee for communications use authorizations to cover the Agency's costs of administering its communications use program, is programmatic and would not have any direct effects on tribes. Tribal consultation will occur as appropriate in connection with specific applications for communications facilities on NFS lands.

Environmental Justice

The Agency has considered the proposed rule under the requirements of EO 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*. The Agency has determined that the proposed rule is consistent with EO 12898.

No Takings Implications

The Agency has analyzed the proposed rule in accordance with the principles and criteria in EO 12630, *Governmental Actions and Interference with Constitutionally Protect Property*

Rights. The Agency has determined that the proposed rule would not pose the risk of a taking of private property.

Energy Effects

The Agency has reviewed the proposed rule under EO 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*. The Agency has determined that the proposed rule would not constitute a significant energy action as defined in EO 13211, and OIRA has not otherwise designated the proposed rule as a significant energy action.

Civil Justice Reform

The Agency has analyzed the proposed rule in accordance with the principles and criteria in EO 12988, *Civil Justice Reform*. After adoption of the proposed rule, (1) all state and local laws and regulations that conflict with the proposed rule or that impede its full implementation would be preempted; (2) no retroactive effect would be given to the proposed rule; and (3) it would not require administrative proceedings before parties may file suit in court challenging its provisions.

Unfunded Mandates

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538), signed into law on March 22, 1995, the Agency has assessed the effects of the proposed rule on state, local, and tribal governments and the private sector. The proposed rule would not compel the expenditure of \$100 million or more by any state, local, or tribal government or anyone in the private sector. Therefore, a statement under section 202 of the Act is not required.

Controlling Paperwork Burdens on the Public

The proposed rule does not contain information collection requirements as defined in 5 CFR part 1320 that are not already required by law or not already approved for use. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and its implementing regulations at 5 CFR part 1320 do not apply.

List of Subjects in 36 CFR Part 251

Electric power, Mineral resources, National forests, Rights-of-way, and Water resources.

Therefore, for the reasons set forth in the preamble, the Agency proposes to amend part 251, subpart B, of title 36 of the Code of Federal Regulations as follows:

PART 251—LAND USES

Subpart B—Special Uses

1. The authority citation for part 251 continues to read:

Authority: 16 U.S.C. 460l-6a, 460l-6d, 472, 497b, 497c, 551, 580d, 1134, 3210; 30 U.S.C. 185; 43 U.S.C. 1740, 1761-1772.

2. Amend § 251.54 by adding paragraph (g)(5)(iii) to read as follows:

§ 251.54 Proposal and application requirements and procedures.

* * * * *

(g) * * *

(5) * * *

(iii) *Annual programmatic administrative fee for communications use authorizations.* An annual programmatic administrative fee shall be assessed for each new and existing communications use authorization as of **[Effective date of final rule]** based on the total annual estimated costs to the Forest Service of administering its communications use program, allocated as deemed applicable by the Forest Service between communications use authorizations for wireless uses and communications use authorizations for fiber optic cable and prorated as deemed applicable by the Forest Service among all holders of those authorizations. The Forest Service shall maintain a schedule in its directive system (36 CFR 200.4) of the annual programmatic administrative fee for communications use authorizations for wireless uses and the annual programmatic administrative fee for communications use authorizations for fiber optic cable. These two annual programmatic administrative fees shall be updated annually based on

the difference in the U.S. Department of Labor Consumer Price Index for All Urban Consumers, U.S. City Average (CPI-U), from July of one year to July of the following year, rounded up or down to the nearest dollar. The Forest Service shall also enumerate in its directive system the annual programmatic administrative costs for which the two fees are charged. Within 5 years of **[Effective date of final rule]**, and at least every 5 years thereafter, the Forest Service shall review the amount of and bases for the two annual programmatic administrative fees and shall revise them as needed to ensure they continue to reflect the Forest Service's total annual estimated costs of administering its communications use program.

Dated: December 16, 2021.

Meryl Harrell,

Deputy Under Secretary, Natural Resources and Environment.

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